

REMARKS

Reconsideration and allowance in view of the foregoing amendments and the following remarks are respectfully requested.

Claims 1-23 remain pending in the present application.

Claim 1 stands rejected under 35 U.S.C. § 102 as being anticipated by U.S. Patent No. 5,693,944 to Rich ("the '944 patent"). Applicant respectfully traverses this rejection for the reasons presented below.

Independent claim 1 has been amended to clarify that in the gas sampling assembly of the present invention, gas flows from a sample site, into the filter portion, where it is filtered by the at least one filter element, and then to the sample chamber of the sample collection portion, where a constituent of the gas is monitored or measured. To this end, a gas flow path is recited in the housing of the filter portion of the claimed gas sampling assembly. Applicant respectfully submits that the '944 patent does not teach or suggest a gas sampling assembly having these features.

The Examiner cites the '944 patent as including a filter 92 disposed in a filter portion 30. It is clear from reviewing the '944 patent that portion 30 is not part of the gas flow path. That is, gas from the sample site does not flow through filter portion 30. Instead, filter portion 30 serves as the housing for the infrared radiation detecting elements 66 and 68. Moreover, filters 90 and 92 are optical filters. They do not filter the flow of gas. Due to the vast differences between the features of the '944 patent relied upon by the Examiner in rejecting claim 1 and claim 1, as now amended, applicant submits that one skilled in the art would not consider it obvious to modify the teachings of the '944 patent achieve the claimed invention.

For the reasons presented above, applicant respectfully submits that independent claim 1 is not anticipated or rendered obvious by the cited references. Accordingly, applicant respectfully requests that the above rejection of claim 1 be withdrawn.

Claims 3-5 and 12-15 stand rejected under 35 U.S.C. § 103 as being unpatentable over the '944 patent. Applicant respectfully traverses this rejection for the reasons presented above with respect to independent claim 1. It should be noted that independent claim 12 has

been amended along the same lines as independent claim 1. In addition, claims 3-5 and 13-15 depend from either claim 1 or 12. Thus, applicant respectfully submits that independent claim 12, and dependent claims 3-5 and 13-15 are not rendered obvious by the cited references. Accordingly, applicant respectfully requests that the above rejection of claim 3-5 and 12-15 be withdrawn.

Claims 1-23 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-26 of U.S. Patent Appln. No. 10/384,329 ("the '329 application"). While the applicant does not agree that the claims in the present application are in conflict with the claims in the '329 application, because the claims in the present application recite features that are not obvious based on the claims in the '329 application, such as the integration of the sample cell with the filter element, applicant notes that M.P.E.P. § 804(I)(B) sets for the process for handling provisional double patent rejections. According the this section:

"The "provisional" double patenting rejection should continue to be made by the examiner in each application as long as there are conflicting claims in more than one application unless that "provisional" double patenting rejection is the only rejection remaining in one of the applications. If the "provisional" double patenting rejection in one application is the only rejection remaining in that application, the examiner should then withdraw that rejection and permit the application to issue as a patent, thereby converting the "provisional" double patenting rejection in the other application(s) into a double patenting rejection at the time the one application issues as a patent.

If the "provisional" double patenting rejections in both applications are the only rejections remaining in those applications, the examiner should then withdraw that rejection in one of the applications (e.g., the application with the earlier filing date) and permit the application to issue as a patent. The examiner should maintain the double patenting rejection in the other application as a "provisional" double patenting rejection which will be converted into a double patenting rejection when the one application issues as a patent."

M.P.E.P. § 804(I)(B). Applicant notes that at the present time, the claims in the present application and the claims in the '329 application both stand rejected for reasons other than the provisional double patenting issue. Therefore, it is premature to address this issue in the present application, because, for example, the clams in the '329 application may be altered or abandoned.

It is the applicant's further understanding, that if the above amendments to claims 1 and 12 and/or the above remarks are sufficient to overcome the rejection of the claims based on 35 U.S.C. § 102/103, leaving only the provisional double patent rejection in the present

RICH -- Appln. No.: 10/678,692

application, the provisional double patent rejection in the present application should be withdrawn, assuming that the claims in the '329 application are also not yet allowed or issued. This is so because there would be no extension of patent term as a result of the allowance of the present application, due to the fact that the claims in the '329 application have not yet been allowed or issued. Thus, applicant respectfully submits that the provisional double issue should be deferred and revisited at the appropriate time, according the procedures set forth in M.P.E.P. § 804.

This response is being filed within the three-month statutory response period which expires on June 9, 2005. In addition, no additional claim fees are believed to be required as a result of the above amendments to the claims. Nevertheless, the Commission is authorized to charge the any fee required under 37 C.F.R. §§ 1.16 or 1.17 to deposit account no. 50-0558.

All objections and rejections have been addressed. It is respectfully submitted that the present application is in condition for allowance and a Notice to the effect is earnestly solicited.

Respectfully submitted,

By Michael W. Haas
Michael W. Haas
Reg. No.: 35,174
Tel. No.: (724) 387-5026
Fax No.: (724) 387-5021

RESPIRONICS, INC.
1010 Murry Ridge Lane
Murrysville, PA 15668-8525